LCRO 7/2013

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [City] Standards Committee [X]
BETWEEN	**DA** Applicant
AND	**EB** Respondent

DECISION ON ORDERS UNDER SECTIONS 156, 206(4) AND 210

The names and identifying details of the parties in this decision have been changed.

[1] This decision on penalty and costs follows the final decision dated 26 August 2014 in which findings of unsatisfactory conduct were made against Ms DA pursuant to s 12(c) of the Lawyers and Conveyancers Act 2006 (the Act) in respect of six breaches of the Act, the Trust Accounts Regulations, and the Conduct and Client Care Rules made under the Act.

[2] Ms DA was ordered to cancel her fees to Ms EB, and refund $2,117.24, which she and Ms EB say she has done.

[3] Both parties were invited to tender submissions with respect to penalty orders and costs. Ms EB seeks compensation for anxiety and stress that she attributes to the deficiencies in Ms DA's conduct, has no particular concern about publication, and seeks a contribution to her costs of review from Ms DA.

[4] Ms DA is of the view that publication of her name in the public interest is not necessary, although she considers the facts of the decision may be of interest to the profession more broadly. She notes that she has already complied with the orders cancelling her fee, and paying refunds to Ms EB. She also indicated that the New Zealand Law Society (NZLS) had sought payment of the costs order made in its favour by the Standards Committee. Ms DA is resistant to Ms EB's application for compensation, saying she has not suffered a loss as a consequence of Ms DA's conduct, and that all her anxiety and stress is the result of her former employer's treatment.

[5] Ms DA asks that the financial consequences to her be taken into account if consideration is given to imposing a fine on her. She says there is no evidence that Ms EB has incurred any costs that should be reimbursed to her, but accepts it is open to me to make orders censuring her, and requiring her to apologise to Ms EB.

Submissions

By Ms EB

[6] Ms EB's submissions centre on her claim for compensation. In support she has provided evidence by way of a report from a counsellor, addressed "to whom it may concern", dated 9 November 2010, and received by this Office on 11 March 2014, which was the date on which the review hearing occurred. As the original date of the counsellor's comments was November 2010, and Ms DA began representing Ms EB in October 2010, I take it that her report was prepared in support of Ms EB's claims against her employer. I have no hesitation in accepting the counsellor's comments, which support Ms EB's assertion that she was already in a fragile mental state when she instructed Ms DA, a fact that Ms DA readily accepts.[1] I also accept that Ms EB was in a similar state throughout the time Ms DA represented her, and again Ms DA does not contest that.[2]

[7] Ms EB says that Ms DA's deficient accounting meant that she did not know exactly how much she owed, and "this was the cause of [her] anguish". She says that Ms DA's professional failings added to the anguish and stress that her former employer was already causing to her, and that, three years later, she is still depressed.[3]

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[1] DA submissions (30 October 2014).
[2] Above n 1.
[3] Email EB to LCRO (9 April 2014).

[8] Ms EB says she believes Ms DA intentionally short-circuited the intervention rule, negotiating her fee directly with CR, as a ploy to leverage a better financial outcome for herself.[4] She says Ms DA deliberately kept her in the dark over the financial aspects of their relationship, which Ms EB says she found confusing and distressing. Ms EB says Ms DA refused to do any work without security for her fees, which Ms EB provided to her directly.[5] She later added that Ms DA had "contrived to attend the final settlement meeting" between her and her former employer, and had then "cunningly contrived to deal direct" with CR to circumvent the NZLS costs assessment process, playing on Ms EB's fears and anxiety.[6]

[9] Overall, Ms EB says that Ms DA's conduct "drove [her] into the pits of despair, well beyond what the stress of a constructive dismissal would have…",[7] that Ms DA took advantage of her vulnerability, and requests compensation of any amount up to the maximum of $25,000 for what she describes as her "extreme distress and anguish", although she acknowledges the decisions from this Office are based on awards that are "modest not grudging".[8] Although at the review hearing Ms EB said at the time of the settlement meeting she considered that Ms DA had secured a good outcome for her, more recently she has formed the view that Ms DA was "barking up the wrong tree the whole time", and that she was despairing over how she would pay Ms DA's fees when she had no job.[9]

[10] In addition to her claim for compensation, Ms EB would like to receive payment for the cost of her time in pursuing her complaint and review application, which she values at $5,000.

By Ms DA

[11] In her submissions of 30 October 2014 Ms DA says that she understands the findings, and accepts the review decision. In considering penalty and costs, she asks that I take into account her evidence, and oral submissions at the review hearing. Ms DA refers to unintentional oversights, and mistakes with respect to accounting processes and invoicing.

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[4] Above n 3.
[5] Email EB to LCRO (28 August 2014).
[6] Email EB to LCRO (6 November 2014).
[7] Above n 5.
[8] Ms EB refers to LCRO decisions *TR v NI* LCRO 109/2011 and Sandy *v Khan* LCRO 181/2009.
[9] Letter EB to LCRO (12 June 2013).

[12] Ms DA says she has been in practice as a barrister sole in New Zealand since 1996, and that her aim "always has been to act professionally". As a barrister sole, she says she had never felt the need to read the Trust Accounts Regulations, because they did not apply to her. Ms DA says it did not occur to her at the time to endorse the cheque to her instructing solicitor, and that she now knows she was wrong to deposit it to her personal account. Having been through the complaint and review process, she says she has a better appreciation of her obligations under the Act, Rules and Regulations, and of how she should run her practice in future.[10]

[13] As mentioned above, Ms DA agrees that Ms EB was in a vulnerable emotional state, but does not accept that Ms EB suffered harm arising from her conduct, saying all of the emotional toll can be attributed to Ms EB's treatment at the hands of her former employer. Ms DA says that she represented Ms EB resolutely, tried to protect her from further harm, and describes herself as having been "empathetic and responsive" in doing what Ms DA describes as "a good job" for Ms EB. She says that she "fought hard" to get Ms EB's compensation and costs.

[14] Ms DA also refers to her evidence, and repeats her:

> ...assurance and undertaking that [if] the same error that occurred, where money that should have been held in trust for a client as was the case here, was deposited into my account, will never happen again. I am greatly embarrassed at this as a barrister, and at my ignorance of the applicable legislation, and hugely regret it, and unreservedly apologise for my action.

Orders under section 156(1) of the Act

[15] Section 156 of the Act provides for a power to make orders, some of which are punitive, others remedial, restorative or financial, following a determination under s 152(2)(b) that there has been unsatisfactory conduct on the part of a practitioner. That determination having been made on review, and orders having already been made under section 156(1)(f) and (g), I have considered the full range of remaining orders available under s 156(1), taking into account the functions of penalty, purposes of the Act, fundamental obligations of lawyers, and the impacts of Ms DA's unsatisfactory conduct on Ms EB. I consider the following orders are appropriate for the reasons set out below:

(a) An order censuring Ms DA (s 156(1)(b));

(b) An order that Ms DA apologise to Ms EB (s 156(1)(c));

[10] Above n 1.

(c) An order that Ms DA pay compensation to Ms EB of $2,000 (s 156(1)(d)); and

(d) A fine of $1,000 payable to NZLS (s 156(1)(i)).

Functions of penalty

[16] The functions of penalty orders in a professional disciplinary context include punishing a practitioner, acting as a deterrent to other practitioners, and reflecting the public's and the profession's condemnation or disapproval of the practitioner's conduct.[11]

[17] The seriousness of the conduct may affect which specific penalty is selected, depending on which particular function is being met.

Seriousness

[18] It is helpful in assessing the seriousness of Ms DA's conduct to consider the purposes set out in s 3 of the Act, and the fundamental obligations of lawyers in s 4, which relevantly say:

> **3 Purposes**
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> (1) The purposes of this Act are –
>
> (a) to maintain public confidence in the provision of legal services...:
>
> (b) to protect the consumers of legal services…:
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> ...
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> (2) To achieve those purposes, this Act, among other things, –
>
> (a) reforms the law relating to lawyers:
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> …
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> **4 Fundamental obligations of lawyers**
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> Every lawyer who provides regulated services must, in the course of his or her practice, comply with the following fundamental obligations:
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> (a) the obligation to uphold the rule of law and to facilitate the administration of justice in New Zealand:
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> …
>
> (c) the obligation to act in accordance with all fiduciary duties and duties of care owed by lawyers to their clients:

[11] *Wislang v Medical Council of New Zealand* [2002] NZAR 573 at [21].

> (d) the obligation to protect, subject to his or her overriding duties as an officer of the High Court and to his or her duties under any enactment, the interests of his or her clients.

[19] The conduct for which Ms DA now faces the consequences relates to payments she received from Ms EB for which she failed to properly account, and did not pay into a trust account. By that conduct, Ms DA breached ss 110 and 111 of the Act, and regulation 10 of the Trust Account Regulations on two occasions. Ms DA also failed to provide written information to Ms EB as she is required to do by rules 3.4 and 3.5 of the Conduct and Client Care Rules.

[20] Those breaches are inconsistent with the Act's purposes of maintaining public confidence in the provision of legal services, and protecting the consumers of legal services. Failing to deal with payments made by Ms EB, and holding her money in her personal account in the course of her practice, rather than paying it into a trust account, resulted in Ms DA failing to comply with her statutory obligations under ss 110 and 111 of the Act, and did not protect Ms EB's interests. Failing to properly inform Ms EB did nothing to help her to understand what Ms DA would do for her, or provide a frame of reference for the services she would receive.

[21] Ms DA's evidence is that her conduct was unintentional, based on her misapprehension, or lack of understanding, of the rules around receipt of client money. Ms DA also said that she had in practice as a barrister sole since 1996, so her practice spans the period before and after the regulatory regime that came into force under the 2006 Act.

[22] The Act had been in force for over two years when Ms DA acted for Ms EB. There was no shortage of publicity around the changes for the profession. The handling of client money has always been a sensitive subject for lawyers under the old regime and the present one. I therefore do not accept the submission put by counsel for Ms DA that her conduct can somehow be excused because the changes to the regulations that affected barristers were implemented "almost surreptitiously".[12]

[23] I accept Ms DA's evidence to the effect that she has caused herself embarrassment by her lack of understanding around the Act, Regulations and Rules.

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[12] Submissions GW to NZLS (2 October 2012) at [30].

[24] I also accept Ms DA's evidence that she has attempted to remedy the deficiencies in her knowledge by seeking professional advice, and revising her approach to her practice based on that advice.

[25] Any adverse professional conduct finding that relates to the handling of client money carries the risk of serious consequences, particularly because a knowing breach of s 110 of the Act may constitute a summary offence.

[26] Determinations about knowledge in respect of ss 110(4) and 111(2) are more appropriately reserved to be determined in the context of a prosecution for such an offence. In the context of orders under s 156(1) of the Act, where the standard of proof is the civil standard on the balance of probabilities, I consider it more likely than not that her breaches were through ignorance, rather than being deliberate. However those findings would not constitute a defence to a prosecution for a summary offence, if one were to eventuate. That approach also ensures that Ms DA cannot be penalised twice for the knowledge element of ss 110 and 111.

[27] Overall, while her conduct does her no credit, I do not consider that Ms DA should be visited with consequences of the most serious kind.

Culpable

[28] Ms DA is solely culpable for her conduct.

The impact on Ms EB

[29] In considering the appropriate orders to make under s 156(1) I have assessed the impacts of Ms DA's conduct on Ms EB. Plainly Ms EB was in a fragile emotional state when she came to Ms DA. Her emotional state at the end of Ms DA's engagement was probably little better. Although she had, with Ms DA's assistance, secured an exit package and a payment from her former employer, by her own choice, or because of her former employer's treatment, she had no job, and no income. Neither of those things was Ms DA's fault.

[30] What Ms DA could have done better was to conduct herself in a way that did not add to her client's problems by properly attending to her professional obligations according to the relevant rules and regulations. I am also conscious, however, that Ms DA's involvement occurred at the end of a highly stressful period in Ms EB's life. In my view, to a degree Ms DA's conduct contributed to what I shall loosely describe as Ms EB's breakdown. It could even have been "the final straw" for Ms EB.

[31] I consider it appropriate to recognise that contribution by making an order in favour of Ms EB for compensation in an amount that is "modest … [but] not grudging"[13] in accordance with the usual practice of this Office when making orders to compensate for anxiety and stress caused by a failing in a practitioner's conduct.

Orders

Censure – s 156(1)(b)

[32] The Court of Appeal discussed censure in the disciplinary context of s 156(1)(b) in *New Zealand Law Society v B* describing censure as a:[14]

> … formal or official statement rebuking a practitioner for his or her unsatisfactory conduct. A censure … Is likely to be of particular significance in this context because it will be taken into account in the event of a further complaint against the practitioner in respect of his or her ongoing conduct … a rebuke of a professional person will inevitably be taken seriously.

[33] An order for censure is appropriate in the circumstances, to mark out Ms DA's unsatisfactory conduct, and to act as a deterrent to others.

An order that Ms DA apologise to Ms EB – s 156(1)(c)

[34] An apology is not a punishment, nor is it intended to act as a deterrent. Ms DA has already tendered an open apology in her submissions, but it is appropriate, given the circumstances, for her to direct a sincere apology to Ms EB.

[35] Ms DA's apology should recognise the comments set out in this decision, and the substantive decision. It need not be lengthy, but should acknowledge Ms DA's contribution to Ms EB's difficulties at an already stressful time. The apology should be phrased in a way that helps to both fulfil the consumer protection purposes of the Act, and to maintain public confidence in the provision of legal services.

An order that Ms DA pay compensation to Ms EB pursuant to s 156(1)(d)

[36] After a determination has been made that a practitioner's conduct has been unsatisfactory, a standards committee or the LCRO has the power to make an order under s 156(1)(d) of the Act which says:

> (d) where it appears to the [LCRO] that any person has suffered loss by reason of any act or omission of a practitioner... order the practitioner ...

[13] *Sandy v Khan* LCRO 181/2009 at [29].
[14] *New Zealand Law Society v B* [2013] NZCA 156 at [39].

> to pay to that person such sum by way of compensation as is specified in the order, being a sum not exceeding [$25,000].

[37] Compensation has previously been acknowledged in decisions of this Office as being available to address anxiety and distress caused by lawyers as a consequence of their unsatisfactory conduct, although "[t]here is of course no punitive element to an award of damages for anxiety and distress. Such an award is entirely compensatory", and that orders for compensation "should also be modest (though not grudging) in nature".[15] In calculating the appropriate amount for an award it has been noted that "previous decisions of the LCRO are… of limited assistance, as… the facts and circumstances of each case differ widely".[16] Nonetheless, I have reviewed the range of compensatory amounts ordered with respect to anxiety and stress, which cover a reasonably wide range, starting at $500[17] with orders increasing in amount for conduct that caused "considerable"[18] or "a great deal"[19] of anxiety and stress. I have been unable to identify any order in excess of $9,000 under s 156(1)(d).

[38] As mentioned above, there is no dispute between Ms DA and Ms EB that Ms EB was in a fragile emotional state when she came to Ms DA. In my view Ms DA's conduct, occurring at the culmination of a highly stressful period in Ms EB's life, is likely to have added unnecessarily to Ms EB's anxiety and stress.

[39] There was no need for Ms DA to cause Ms EB any anxiety or stress over her financial position. Ms EB is right to say that she should have received information in advance, updated as necessary throughout the retainer, and regular reports recording what she had paid and where it had gone.

[40] Although Ms DA was under no obligation to provide a quote for future work, it is likely that a consumer in Ms EB's position would find it unsettling to discover that his or her lawyer had incurred a further $8,000 in fees without having been issued with an invoice.

[41] It is not realistic for a consumer to expect their lawyer to work without being paid, but to treat her obligations in respect of Ms EB's money so lightly was inconsistent with the consumer protection and maintenance of public confidence purposes of the Act. Ms DA's conduct contributed to a degree that warrants an order for compensation. In all the circumstances, I consider the sum of $2,000 is appropriate.

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[15] Above n 12.
[16] LCRO 219/2010 at [64].
[17] *TC & TD v NV* LCRO 225/2011.
[18] *RI v Hart* LCRO 158/2011 at [77].
[19] *TR v NI* LCRO 109/2011 at [96].

A fine of $1,000 payable to NZLS pursuant to s 156(1)(i)

[42] The functions of a fine are to act as a penalty, a deterrent to other practitioners, and to reflect the public's and the profession's condemnation or disapproval of the practitioner's conduct. I consider that a fine is appropriate in the circumstances. Section 156(1)(i) provides for a fine not exceeding $15,000 to be paid to NZLS.

[43] The conclusion mentioned above that Ms DA's conduct was most likely the result of her ignorance of the relevant statutory and regulatory provisions, rather than being deliberately in breach of them, means that a fine towards the lower end of the available range is appropriate.

[44] As with orders for compensation, the range of factors in other decisions from this Office that affect the amount of a fine is so broad as to be of little assistance, and calls for the exercise of judgment.

[45] In all the circumstances, including the other financial implications of this review for Ms DA, Ms DA is ordered to pay a fine of $1,000 to NZLS.

Publication

[46] I have a discretion, pursuant to s 206(4) of the Act to direct the publication of decisions as I consider necessary or desirable in the public interest.

[47] Given Ms DA's breaches of s 110 and 111, I have given consideration to publication of her name.

[48] It is relevant when considering publication that Ms DA is a barrister sole, is unable to operate a trust account and should not routinely handle clients' money. It is appropriate that this decision, and the substantive decision should be published.

[49] When considering whether Ms DA's name should be included in that publication, I note that she says she accepts and understands the decision in this matter. I also note her assurances that she has taken advice, and altered her practices accordingly. I am not aware of any previous regulatory breaches by Ms DA.

[50] Overall, I do not consider it necessary or desirable in the public interest to publish Ms DA's name.

Costs

[51] The LCRO has a wide ranging discretion to make orders for costs under s 210 of the Act, and the LCRO's Costs Orders Guidelines.

[52] The Guidelines say that where the review application was reasonable (whether or not the decision of the Standards Committee is modified or reversed) and the parties have acted appropriately, parties will generally be expected to bear the costs they incurred in being a party to the review.[20]

[53] I note that Ms EB sensibly attended the review hearing by phone rather than incurring the expense of attending in person.

[54] There has been no conduct by either party in the course of the review that affects my approach according to the Guidelines, so each party will bear her own costs on review.

[55] The Guidelines also provide for costs to be paid by a practitioner where, as here, a finding of unsatisfactory conduct is made or upheld against that practitioner. The review has been of average complexity. In the circumstances Ms DA is ordered to pay costs where there has been a hearing in person, in accordance with the Guidelines, in the amount of $1,600.

Decision

(1) Pursuant to s 156(1) of the Lawyers and Conveyancers Act 2006, Ms DA is:

  (a) Censured;

  (b) Ordered to apologise to Ms EB; and within 28 days of the date of this decision ordered to pay:

    (1) Compensation to Ms EB of $2,000.

    (2) A fine of $1,000 to New Zealand Law Society.

(2) Pursuant to s 206(4) of the Lawyers and Conveyancers Act 2006, I direct publication of this decision in the public interest, with any details identifying either party removed.

[20] LCRO Costs Orders Guidelines at [12].

(3) Pursuant to s 210(1) of the Lawyers and Conveyancers Act 2006, Ms DA is ordered to pay costs on this review of $1,600.

DATED this 3rd day of December 2014

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D Thresher
Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Ms DA as the Applicant
Ms EB as the Respondent
[City] Standards Committee [X]
The New Zealand Law Society